

A CARTOGRAPHY OF CRITICAL LEGAL THEORIES: NOTES FOR A REFLECTION ON THE RELATION BETWEEN LAW AND POWER¹

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Abstract: This paper proposes an identification of the main arguments suggested by certain critical theories concerning the relationship between law and power. In order to (re)think the function of law as an instrument not only of power, but as an element of social transformation, we promote here a reflection on aspects raised by these theories; among others, the same notion of power, oppression, intersectionality or decoloniality. These categories are relevant to examine how law regulates the experiences of discrimination of specific social groups, highlighting the intimate relationship between the social contexts, the premises and the legal answers. To do so, we examine in particular how asylum law responds to claims grounded on sexual orientation and gender identity. Finally, this reasoning suggests a conception of law oriented to action and the social change.

Keywords: law, power, sexuality, gender, decoloniality, critical theories.

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A CARTOGRAPHY OF CRITICAL THEORIES OF LAW: NOTES FOR A REFLECTION ON THE RELATION BETWEEN LAW AND POWER

1. INTRODUCTION

The emergence of new theoretical frameworks to explain and understand law and rights has enriched the debate on certain premises or dimensions traditionally accepted, such as the idea of equality, as some characteristics of the subject of rights. Although this is not a new phenomenon, even less in the field of legal philosophy, it is worthwhile to understand those challenges posed by recent approaches in a socio-political context in which rights are at tangible risk of being attacked. The constant adoption of measures restricting the entry into European territory and its effects shows the excessively fragile

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protection of the refugees' rights³, at the same time as political discourses are resurfacing the threaten (and on occasions restrictions indeed) of women's rights⁴ and LGTBIQ groups⁵, among others. We can even say that these groups and minorities face more difficulties and obstacles in the protection and fulfilment of their human rights, very often due to social and power-related reasons.

With this scenario, this paper proposes a cartography of some notions and theories to rethink specific key questions related to law and power, and regarding their connections in particular. This specific approach has been widely, though not peacefully, addressed by the so-called alternative or critical legal theories (hereinafter CLT), admitting the "materiality" of law and its dependence on social and political structures, moving away from a transcendental sense of justice (Barrère, 2018). If, as these theories suggest, law is not neutral but apprehends both the sense of structures and the relations generated from power, it is possible to argue that legal discourse creates a truth that is not neutral either. Somehow, it is aligned with the meaning of the socio-political structures. These CLT have had a greater echo in the social sciences, philosophy and anthropology, amongst others, but less in legal theory (Barrère, 2010). Also, probably due to the fragility of some claims of the CLT (Arias Marín, 2013: 108).

Generally speaking, many of these authors reiterate the aforementioned materiality of the law and its use as a tool for maintaining power relations, which has sometimes resulted in criticism of human rights. For instance, when their universalist character is called into question or a conflict of values is wielded. We may admit that there is a distance or "non-correspondence between the discursive and the normative development of the human rights project" (Arias Marín, 2013: 101), or a tension between its universalistic orientation and the claim of a cultural diversity, but this does not mean that this "critical distance" would be solved by the neglect of human rights (de Sousa Santos, 2019).

In this discussion, we propose this cartography to understand how these theories problematize basic legal issues and the practice of human rights, supposing that the improvement of the protection of the rights of the most vulnerable will result in the strengthening of the human rights and their ethics. This is why this study analyze legal responses provided by international and national bodies. Since there are many issues to address, this work focuses especially on the controversies and legal barriers to provide an

³ This has been pointed out since 2015 by the Council of Europe Human Rights Commissioner in his report Human Rights in Europe: From Crisis to Renewal. <https://rm.coe.int/human-rights-in-europe-from-crisis-to-renewal-/168077fb04> (last consulted 17 April 2020).

⁴ In this sense, the platform of international experts of the United Nations in the fight against violence against women and girls pronounced barely less than a year ago in the communiqué "Violence and harassment against women and girls in the world of work is a human rights violation, say independent human rights mechanisms on violence against women and women's rights".

⁵ This was stated by the UN Independent Expert on Protection from Violence based on Sexual Orientation and Gender Identity and the Rapporteur on the Rights of LGBTI People of the Inter-American Commission on Human Rights in their joint statement of October 2019. <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25120&LangID=E> (last consulted 17 April 2020)

effective protection to asylum claims grounded on sexual orientation and gender identity. We understand the case of these refugees as a clear example of a lack of protection of rights, in whose analysis some approaches and ideas of these theories deserve to be considered.

Our initial hypothesis here is that some of the premises of the legal responses to such claims are based on social and structural power relations linked to race, national origin, gender and sexuality issues. If someone takes a certain historical or comparative perspective on these responses, it is possible to conclude that they were initially rejected for legal and pre-eminently contextual reasons (i.e., the exclusion of sexual orientation and gender identity from the refugee law), insofar as they had to do with the ways of understanding these diverse identities and sexualities (i.e., a private matter without any public dimension). Later on, they were admitted, but in an inconsistent way – since very different, sometimes contradictory reasons were given and there are not common reasonings or justifications - and even in the short term, without modifying the asylum system or ensuring or consolidating this protection based on human rights.

With the aim of providing elements for the discussion, we propose a map of the central reasonings of critical feminist theories, the intersectionality approach, some notions from the post-structural theory and from the decolonial theories. These theories may provide some parameters of analysis of issues of power related to gender and sexual orientation in a context of globalization, which requires to refer to decolonial reasonings. First, because they explain and question the presuppositions of hegemonic discourses about the subject of rights, policies and ideas. Second, because these notions become a challenge the legal phenomenon, since they promote the (de)construction of the identities and the (pre)eminent power structures that permeate it. Specifically, I refer to Foucault's notions of power, domination and oppression in Mackinnon and Young, intersectionality in Crenshaw, diaspora in Brah, identity/subjectivity in Butler, coloniality in Mignolo and Quijano, and gender coloniality in Lugones, Anzaldúa and Spivak. All with the aim of strengthening the strategies and possibilities of action of the law (Barrère, 2018: 16-19).

2. INDIVIDUALITY VS. CONTEXTUALIZATION

There is a clear assumption in this work; we are contextualized or situated subjects, and our identity is created according to the socio-cultural structures in which we develop our personal projects. Despite that, we do not focus specifically on identity issues, but whether the law assumes or not these issues or the contextualization of subjects, and if so, which are its effects. Being aware that equality before the law should rest on the idea of an abstract subject, this character has been questioned by the aforementioned theories saying that this subject could have been constructed *de facto* with certain biases of gender, sexuality, race, capacity, etc. This could be also the reason why the exclusion of the experiences of persecution of certain groups from the asylum system requires a deeper reflection in these terms. Mainly, we can say, because the asylum procedures were thought in accordance with the experiences of persecution of a particular group -the so-called political refugees-, without having changed much since 1951, and this regime still

demands a self-referential narrative from subjects whose account should fit in with these features or assumptions initially configured⁶.

If these theories are correct, then, an analysis about this "neutralizing" process and its consequences is needed. In this regard, we bring different kind of theories trying to construct a set of criteria to dismantle the obstacles for an effective protection of human rights, or at least to point out those (political or theoretical) premises which exclude some subjects or objects. For instance, we need to understand whether migration policies produce normativity not only in relation to territoriality or citizenship, but also in relation to sexuality and the perceptions or expressions of gender. If this is the case, the universality of this subject must be examined from the perspective of the otherness (if we take as valid the Butler proposal of the constitutive processes of the subject, as we will see later), produced from multiple axes, structures and processes that construct societies. Similarly, the role and functions of the law are also in question.

These theories have "destabilized" some categories promoting the resignification of identities, when the role of law and its connection to power remains controversial. For this same reason, the complex identities resulting from the share of various characteristics or the adscription to social groups in a situation of vulnerability or absence of power (such as the LGTBIQ asylum seeker) are taken as a paradigm or object of discussion. The demands of these subjects are usually linked to aspirations and claims that are strongly linked to the contexts and that may require a reinterpretation of existing legal measures or institutions (as has happened in relation to citizenship, marriage or asylum) or new demands (like the claim of a right to gender self-determination and sexual identity, for example). All this to promote the emancipation of individuals with a relational perspective of rights, suggested by Álvarez (2017a: 42), and to enhance the role and functions of the law in this respect.

3. THE DUAL VISION OF LAW: POWER ACCORDING TO FOUCAULT

Traditionally, law has been understood as a tool or mechanism for the maintenance and dissemination of power, which comes to merge the political and the legal (Luhman, 2006: 291). Thus, in the description of the law as a system, Luhmann maintains that the legal communications and the law consequently have a double function; "to be a factor of production and to be conservative of the structures" (Ibid, 32). This dual conception as a mechanism of power maintenance as well as a tool of social change for emancipation has been invoked by different approaches to reflect on the meanings and functions of the law, politics or even the same notion of power (Cordero, 2020: 4). In this sense we may interpret the evolution on the sense of law in Foucault's texts, who, in his first works on

⁶ This exemplifies the need to review, or at least rethink, the assumptions of a regime such as asylum. While the express recognition of sexual orientation and gender identity is a step forward towards the protection of these claims, the obstacles arising from the status determination procedure, as well as from reception or arrival, show the inadequacies or deficiencies in this regard. The recognition of refugee status is conditional on the proof of the acts that are considered persecution, and it can be established on the basis of substantiated and accurate (as possible) accounts of the acts lived by the subject (Millbank, 2009)

the genealogy of power, identified it as a "sword", that is to say, as mechanism of power characteristic of the *ancien regime* (Foucault, 2011:44). The French thinker argues then rights are specific forms of knowledge-power that shape or produce the subject (Foucault, 2000; Golder, 2015: 287). However, in his latest writings we can see a change in his perception of (individual) rights, as he finally conceives them as possible mechanisms to confront power, at least strategically (Golder, 2015: 295).

Foucault's theoretical approach to power has influenced most of critical theories, although he relegates law as a secondary element in the allocation of positions and the imposition of relations of power. His interest lies in explaining and examining its expression – of power -, and how its exercise is central in different fields outside the legal phenomenon, such as the economy, demography or medicine. This is possible because he understands it as an element of control or creator of discipline that articulates diverse technologies, regimes and/or devices, which in turn permeates all social instances, including the construction of the truth (Foucault, 2011).

According to him, power passes from functioning with a "punitive mechanics" (Foucault, 2000), roughly understood as a prohibition of conducts and the corresponding punishment, to reproduce itself in the form of "incitement, seduction and production of knowledge" (Sauquillo, 2017: 192 and following), and hence establishing regimes of veracity (Foucault, 2000). This transit is possible when power is decentralized (not being located in any specific figure, like the king or the ruler) and is exercised by and through different social structures of any community, using the creation and reproduction of knowledge in the shape of truth. For this reason, for Foucault, the discursive practice has a socio-political character. That is to say, the discourse, this is "the detention and diffusion of the word", and its formation are constructed and diffused in and from the field of normativity, not necessarily or not always with a legal or regulatory appearance, what demands its "political analysis" or examination beyond the law (Sauquillo, 2017: 135). In other words, power creates knowledge, and the latter dilutes and deploys the logic of the former in every area of society (Foucault, 2000).

In his *History of Sexuality* and other writings, Foucault (2002) explains this *iter* in order to understand the creation and subsequent reception in medical discourses of homosexual identity. If before there was no such category - that of homosexual -, much less in relation to people's subjectivity, its creation finally produces a normativity from which to identify and regulate not only behaviors, but also identities, and therefore subjects. Sexuality becomes then an object of knowledge and a normative sphere (the permission or prohibition of sexual practices or public health measures are good examples), whose immediate consequence is the criminalization of non-heteronormative sexual practices and non-hegemonic identities (Foucault, 2002; Weeks, 2007). At this stage, law appears as a source to legitimize this medical order, while relying on the objectivity of the latter to justify such regulation (Foucault, 2002). This would explain the prohibition of homosexual intercourses in some countries when homosexuality was considered a mental illness at the DSM until 1973, or the pathologization of transgender's experiences due to the gender dysphoria is still included at the DSM. We see, according to the French thinker, the creation of a framework in which this diffuse power is diluted, and its logic becomes intelligible. At

first, this interpretation excludes any possibility of agency or autonomy of the subjects (thus rejecting the liberal theory of rights), nevertheless, in his last writings a change is glimpsed.

Foucault affirms that there is a minimum autonomy of subjects from which he deduced an instrumental vision of rights. This means that, for him, rights become mechanisms of resistance to power, and if so, law can then be understood as an instrument for change (Golder & Fitzpatrick, 2009). In fact, he calls a revision of proceedings rules, criminal system or even autonomy in relation to sexuality, insisting on rejecting the existence of a human nature and therefore a subject of rights unconnected to the historical-social reality (Golder, 2015). *Sensu contrario*, the subject or rights has to be (at least social and politically) defined. This allows us to bring here the concept of relational autonomy because it admits "varied developments that can strongly condition its exercise" (Alvarez 2017b:149), complementing Foucault's notion of autonomy. The question that remains, then, is whether this requires a more specific concretion of the subject of rights and to what extent. Regarding the specific case of LGTBIQ refugees, for instance, whether is needed a specific recognition of this kind of claim, without limiting the entitlement of the right to asylum.

4. LAW AND POWER FROM CRITICAL FEMINIST CURRENTS: DOMINATION AND OPPRESSION IN MACKINNON AND YOUNG

Although the historiography of Foucaultian power constitutes one of the best-known criticisms of traditional conceptions of power, there are close positions explaining its logic and effects with a similar intensity and highlighting some other relevant dimensions. Specifically, I refer to those coming from critical feminisms, in particular Young and MacKinnon's, whose works examine their interactions in inter-gender relations. Broadly speaking, they review the interpretation given to sexual difference and the normative discourses it produces. In an explanatory key, they address the construction and meaning of gender-based stereotypes, identities or models based on a logic of unequal power that assigns spaces, times, normativity and value to each of these dimensions in a concrete social context (Molina Petit, 2003: 125; Añón, 2016).

With this starting point, Young argues that the mechanisms that maintain power relations are also based on domination or oppression. While domination refers "to the institutional obstacles for self-determination", oppression "prevents people from participating in the determination of their actions or the conditions of their actions" (Young, 2000a: 67-68). Therefore, oppression implies domination and results from a process of subjection or limitation of capacities and possibilities of action. The characterization of oppression as a structural and systemic phenomenon, conceived therefore as imbalance of power between groups (Añón, 2014), reveals how it permeates the systems, structures and social institutions "as a consequence of the normal processes of daily life" (Young, 2000b: 75). The key question is whether this group contextualization means that the social system contributes or gives meaning to identities, exceeding the Foucault's approach.

In her work *Inclusion & Democracy*, Young (2000a) resumes the characterization of gender difference as a structural difference founded on oppression, what explains it disposes a series of relations and interactions from which some options are constructed meanwhile others are excluded. Here lies the normative and unequal character that

ends up shaping the social system in which subjects and social groups are constructed simultaneously (Young, 2000a: 98). For this reason, social systems cannot be understood independently from the subjects that compose them, without identifying the processes from which their interactions happen, nor the normativity ruling these complex actions and expectations of individuals and collectives (Young, 2000a: 95 and following). In some way, we are constructed in social systems and the subjects continue assuring their continuity at the same time that we reproduce their structures and relations.

This conception explains that oppression manifests itself through different forms and how systems and subsystems interact, considering law as one of these system (Young, 2000b: 86 and following). The situation of oppression is reproduced through the different subsystems being at the same time cause and consequence of each other, departing from a notion of inequality different from that of a non-equal distribution of resources. This inequality constitutes the "root" of its diverse manifestations at the same time as its own effect, and it is characterized for being structural, social, systemic and diffuse (Barrère & Morondo, 2005).

According to Barrère & Morondo (2005: 151-158), there is means this is "an inequality of status or power instituted by a norm (or, better, a system of norms) that does not appear explicitly in any corpus (hence "diffuse" discrimination), but it structures the social functioning and reproduces itself both systematically (regardless of the intentionality or will of isolated individuals) and institutionally, insofar as the institutions governing social life do not carry out active or "positive" policies against it". This notion highlights the insufficiency of those analyses based on the individualization of actions or on a unique axe of discrimination, and even the principle of the prohibition of discrimination to combat this situation (Añón, 2014: 113 ff.). Then, this means that law would be an effective or appropriate tool to eradicate inequality only if it overcame the individual experiences of oppression, assuming its structural, social, systemic and diffuse character. This may not affect human rights, at least initially, but most of the current conventions of rights usually refer only to the non-discrimination principle. However, general and sectorial human rights bodies develop different protection instruments and mechanisms, some of which tend already to incorporate this approach (e.g., the Committee on Economic, Social and Cultural Rights⁷, the Committee on the Elimination of Discrimination Against Women⁸, etc.).

⁷ In this sense, the CESCR defines substantive discrimination in the *General Comment N° 20 on Non-discrimination in economic, social and cultural rights* (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights) (E/C.12/GC/20, 2 July 2009), paragraph 9, b, saying that: "Substantive discrimination: Merely addressing formal discrimination will not ensure substantive equality as envisaged and defined by article 2, paragraph 2. The effective enjoyment of Covenant rights is often influenced by whether a person is a member of a group characterized by the prohibited grounds of discrimination. Eliminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations. States parties must therefore immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination. For example, ensuring that all individuals have equal access to adequate housing, water and sanitation will help to overcome discrimination against women and girl children and persons living in informal settlements and rural areas".

⁸ In this regard, the CEDAW asserts in its *General Comment N° 25 on Article 4, paragraph 1, of the Convention (temporary special measures)* (13th Session, 2004), paragraphs 9 and 10 that 9. Equality of results is the logical corollary of de facto or substantive equality. These results may be quantitative and/or

Concerning the relationship between law and power, the understanding of law as a construct that reproduces "domination", raised by Mackinnon (1995: 397 and following), is closer to the Young's notions of oppression and law. Mackinnon maintains that gender and inequality have been examined "as questions of equality and difference" (Mackinnon, 1995, p. 393), since the epistemology of difference has traditionally conceived the sex and therefore the sexual difference as a fact. Instead, she holds that relations are constructed from domination and law reproduces it. This model of domination turns equality into a question of power distribution, as occurs with gender, creating identities based on the supremacy of men and the subordination of women (Mackinnon, 2006a: 248-249). In short, power is the point of origin from which differences are constructed. The epistemology of the difference has naturalized an androcentric model that takes the masculine or the male as "the standard" imposing already certain positions that distribute power (Mackinnon, 2006a: 250). This same reasoning has been used to question the androcentric interpretation of human rights (Arias Marín, 2013: 107), when some international initiatives against gender-based discrimination and violence have problematized some conceptions and practices of some human rights bodies (MacKinnon, 1995).

In this regard, some interesting reasonings are made in her analysis of the legal prohibition of sexual violence. According to her, the sexual component of this violence affirms its structural character and is a consequence of inequality in social life (MacKinnon, 1995: 439-440). However, the legal responses to combat it were initially gender-blinded, that is, presumably blind to gender dimensions, or gender-neutral. This, she explains, has led to insufficient and partial regulations and mechanisms when they are actually formulated from an androcentric point of view (MacKinnon, 2006b: 270). In this sense, the first criminal regulations to combat the so-called domestic violence or so-called abuse did not take into account gender at all. Similarly, the (legal) significance of rape out of a paradigm of domination created the myth of the strange/unknown aggressor in rape cases around the 1970s. Now it is possible to interpret it as a mechanism or mode of control of women's sexuality and even, I would say, as a result of the conjugation of both systems of domination - sexism and racism - creating the myth of the black rapist (Wriggings, 1996: 502-505). Social structures, therefore, shape the law and its practice.

5. THE COMPLEXITY OF SOCIAL STRUCTURES: INTERSECTIONALITY IN CRENSHAW

We mentioned earlier the possible interplay of apparently unrelated social systems and structures. Crenshaw suggests that when different axes of discrimination (domination in the sense proposed by Mackinnon) intersect (meaning coinciding in the same case/person) results in a final and unique identity which cannot be understood just as the mere addition of one to the other ground (Crenshaw, 1996). This notion assumes that the traits

qualitative in nature; that is, women enjoying their rights in various fields in fairly equal numbers with men, enjoying the same income levels, equality in decision-making and political influence, and women enjoying freedom from violence. 10. The position of women will not be improved as long as the underlying causes of discrimination against women, and of their inequality, are not effectively addressed. The lives of women and men must be considered in a contextual way, and measures adopted towards a real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns.

that make up an identity constitute criteria of belonging to groups or collectives that occupy positions of subordination / lack of power / discrimination (it is the case of being "cis woman", "lesbian" and "refugee"), and this idea of concurrence or crossing gives rise to the so-called "*intersectionality*" (Crenshaw, 1996).

In other words, a refugee woman may face situations of discrimination sometimes solely for "being a woman", others solely for "being a lesbian", others for "being a refugee", and others may be due to be a "lesbian refugee woman" at the same time (Parella, 2003: 139 and ff)⁹. So, there are situations in which a singular individual holds different positions of power in combination with other powerless positions, what creates subsystems of domination. This means power relocates subjects according to the position and axes in a set of different systems and subsystems. As suggested by Barrère and Morondo (2011: 31), although intersectionality does not question the structures of oppression, it serves to identify the assumptions and reasons or effects of the inadequacies of anti-discrimination measures (among others) that do not address the complexity of these realities.

In this framework, we wonder whether the law is an adequate instrument to respond to a notion of mobile power, articulated from different features or when different social axes crossed. In fact, the main problem is its suitability to apply, and in that case to which extent, in those situations resulting from the intersection of several grounds, having in mind that legal norms are singularized precisely by the general and abstract nature of the norms and the non-discrimination paradigm. In this sense, various analysis have explained the insufficiencies of this paradigm and the obstacles for an effective protection of rights (Añón, 2014; Barrère and Morondo, 2011). Given the nature of the refugee law and the preexistence of a cross of borders, this framework should be useful to understand every claim of protection and requires to adopt an intersectional approach, what it is not very common.

Similar to Crenshaw, with a clear connection with the experiences of refugees, Brah proposes an analysis of the diaspora as a characteristic reality of today's globalized world, defined as a space or a place inhabited by subjects whose identity is necessarily the result of the intersection of different axes of power. In fact, she understands power as multiaxial in a constant process of formation and displacement (Brah, 2011: 216-217). This notion of power is interesting because, unlike Foucault's proposal, it allows her to adopt an intersectional and structural approach to the possible *positionalities*. In fact, Brah asserts that, when identity traits are combined with each other "in the articulation of power", differentiated images or perceptions are created affecting us in an unequal way according to the different origin or space occupied (Brah, 2011: 216).

⁹ In this regard, in the aforementioned GC 25, paragraph 12, the CEDAW states that "Certain groups of women, in addition to suffering from discrimination directed against them as women, may also suffer from multiple forms of discrimination based on additional grounds such as race, ethnic or religious identity, disability, age, class, caste or other factors. Such discrimination may affect these groups of women primarily, or to a different degree or in different ways than men. States parties may need to take specific temporary special measures to eliminate such multiple forms of discrimination against women and its compounded negative impact on them". It seems the Committee is likely to interpret the Convention with the intersectional approach, although there is still some discussions concerning the axes to be considered (Campbell, 2016).

This means that each trait or characteristic has different meanings depending on the spatial locations and the displacements, becoming this useful to understand the possible different meanings of the identity categories. We wonder if this may affect, and if so how, the construction of the subject of rights and to what extent some critiques to the universalistic character of human rights resort to this argument. However, this cannot particularize any situation or give the same relevance to all the traits, because here lies one of the main risks of these considerations: to justify that law and rights are not needed or to create “separate rights” or privileges¹⁰. In other words, as Stuart Hall (2003) has already pointed out, it is important to discern the features that create identities from those that do not, bearing in mind that a historiography of rights shows how the social stratification of individuals has been strongly based on gender and race. The point, then, is to discern how the law may take them into account, and combat these oppressions, becoming the rights the appropriate instrument to do so. And this should be considered when asylum claims are examined.

6. REVISITING THE NOTION OF POWER: BUTLER'S CONTRIBUTIONS

According to Butler (2004), law and legal actors use (legal and sometimes non-legal) categories presumed to be neutral or beyond any content of power. At least they do not question their content, but the use of these categories gives meanings and imposes norms or characters to identities (although not exclusively) of individuals (Butler, 2004: 23 and following). Hence those who hold positions of power or have the capability to decide are those who regulates the content and meaning of the identities, as pointed out by Mackinnon or Young. In short, categories and discourses are situated in the political sphere, what characterizes them in a similar sense to Brah's politics of location (2011: 247).

Butler observes that the conformation of the subject is relational because we build ourselves (and this means our identities) from a “constitutive outside”, what also identify us adding that we are not¹¹. This process of construction provides some relevant points to revise the idea of the subject. So, we define ourselves not only with the traits that determine

¹⁰ In this regard, the Committee on the Elimination of Racial Discrimination asserts in its *General Comment N° 32 on The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination* (CERD/C/GC/32) paragraph 26, that “Article 1, paragraph 4, provides for limitations on the employment of special measures by States parties. The first limitation is that the measures “should not lead to the maintenance of separate rights for different racial groups”. This provision is narrowly drawn to refer to “racial groups” and calls to mind the practice of Apartheid referred to in article 3 of the Convention, which was imposed by the authorities of the State, and to practices of segregation referred to in that article and in the preamble to the Convention. The notion of inadmissible “separate rights” must be distinguished from rights accepted and recognized by the international community to secure the existence and identity of groups such as minorities, indigenous peoples and other categories of person whose rights are similarly accepted and recognized within the framework of universal human rights.”

¹¹ This process is carried out through performativity as a mechanism of creation of identities is reiterated in a specific context. Martínez Prado points out that “the Butlerian conception understands that the norms, as a condition of possibility of the subjects, require to be reproduced and it is that same process of reiteration that enables the possibility of the interval, as excess and eventually also as possibility of transformation. We are constituted through social norms that restrict and condition our status as “subjects”, although it is the very performativity of the norms, in terms of iterability, that can enable a break with the terms of established

us, but also by those we cannot give a complete meaning because it depends on that other called “constitutive outside”, meaning that our traits are constructed rejecting the traits and meanings that the other (different from me) shares / has. For instance, sexuality or gender are categories whose meaning is constructed by the content of the specific sexual or gender identity shared, but also what they hide: because one sexuality or gender does not necessarily have the same meaning for everyone, and because they are meant by what they are for the other(s) and what they are not (Butler, 2004: 24). In other words, a heterosexual person perceives him/herself with those traits that the homosexual or non-heterosexual subject conceives as heterosexual, but also with those that homosexuals reject because they are socially considered as heterosexual. Hence, it situates us in a collective level and as predefined and delimited subjects (Butler, 2004: 24). This is relevant in order to examine how the sexual orientation or gender identity may be verified through self-constructed narratives at the asylum determination proceedings. In fact, asylum seeker must fit into the category that national laws and the asylum agent consider as homosexual or transgender, denying *a priori* the diversity of experiences and their interaction with other dimensions.

Butler explains that political (or legal) aspirations do not obviate the fact that the "we" - located always in a concrete place and time - from which we enunciate discourses or pronounce ourselves is constituted in a relational way. In our opinion, Butler does not maintain an absolute rejection of autonomy or agency as the axis from which to articulate political discourse, although sometimes her idea of the performativity of gender has led her to this conclusion. In this regard, she asserts that the vindication of women's rights, even with an emancipatory aim, re/produces gender identities, but when she discusses a possible right to gender self-determination (Butler, 1999), she finally admits it is possible to appeal to agency to claim rights. She argues this category allows to address how gay people experience sexuality, the gender identity or expression of trans people, and also the absence of any medical intervention not required by intersex people (Butler, 2017)¹². This approach entails a kind of resistance and a vindication that the law may admit (Álvarez, 2017b), because these issues have been excluded and expelled from the law due to heteronormativity. The reason, then, to accept it is that it confers a legal meaning and value to these claims (Butler, 2017).

Likewise, and in connection with Mohanty's theses (2003; 2008), Butler remembers that, even when universalist claims are based on the protection of agency or autonomy, each person has differentiated modes of meaning it since we constructed our identity in a fixed or at least contextualized way (Butler, 2004: 47). This may explain why there are some asylum claims in which there is no mention to sexual orientation although the persecution is based on having intercourse with another man (Millbank, 2009). Precisely, the rejection of the asylum seeker to identify himself as a gay is due

recognizability. For a framework to become hegemonic it must circulate, that is to say, it must be reiterated through space and time, move and break with the context that gave it origin” (Martínez Prado, 2015: 331)

¹² The current debates on an admission of the right of self-determination have moved in this direction. In fact, there are already various laws according to which it is possible to motivate a registry rectification of a change in gender identity according to the will of the individual or alleging a concrete gender expression. Similarly, the admissibility of self-determination for gender identity is raised in the case law of the European Court of Human Rights.

to share a different notion of homosexuality (for him to be homosexual may mean to have an intimate relationship). That is why the contexts should be reflected on the claim somehow. Although this does not deny the concurrence of a ground, this reasoning explains that the eligibility or not of the status should never depends on identity issues, a fortiori, neither in case of refugee claims based on LGTBIQ issues. This is why I consider relevant to bring in here the decolonial theory.

7. DISPLACEMENTS AND THE RETURN TO KNOWLEDGE/POWER: THE DECOLONIAL THEORY

We talk about decolonial and not post-colonial theories following the theoretical and political position of the first authors. Differences lie in the fact that postcolonial studies are those carried out by professors originally from communities "colonized" by the United Kingdom or France (mostly in Asia and Africa), working at European universities, who criticized the processes of colonization from the 17th and 18th centuries onwards. On the contrary, the decolonial studies arise confronted with the previous ones and the difference between both, according to Galceran, "would be not only in the geographic and cultural scope of reference, but in the use of critical categories in relation to the dominant thought arisen from the experience of subalternity, as well as the thematization of the place that occupies that production of the speech in globalized capitalism" (Galceran, 2016: 57). This relevant differentiation seems to include the context of the subjects as well as the meaning and sense of the categories and, therefore, the located knowledge.

As said before, in line with the decolonial theory, the content of the categories is given by and from the global north; this is, these categories are originated here and their historical-social and the epistemological evolutions take place from there/here. In a similar way as the (universal) subject is revealed as male-centered from the first feminist theories, now we need to focus on the race and location placed in this global north. Here we suggest the adoption of an intersectional approach that includes decoloniality for cases in which the relations between territories and those who occupy them are based on relations of coloniality in a broad sense.

The decolonial theories explain and examine the raciality of the epistemologies and ontologies constructed from the West (Martinez, 2019: 188-189), as well as the political character of the structures before mentioned. Regarding this, their proposal is "to recover concepts such as system-world, center-periphery, geopolitics and eurocentrism to, from there, advance in the problematization of modernity as a material and symbolic process that cannot be thought outside its relation with political, cultural, economic and epistemic practices that resulted in the conformation of a world-wide cartography that reserved unequal places for different countries, regions and populations. This question leads to look at modernity from its constitutive violence" (Soria, 2015: 69). This entails observing modernity and the present taking into account the (sociohistorical, we can add) process of conformation and extending the object of study, as much in relation to the elements to examine as to the spatial and temporal scope. The context cannot be reduced only to the present moment, what makes extremely complicated to propose a pacific integration of this approach at the law.

This dynamic and contextualized analysis of current socio-legal realities allow us to interpret these with an explanatory and political aim. For instance, this may provide a more accurate understanding of current migratory flows and displacements, including the categories of gender or sexuality, which have a strong colonial component. Likewise, the characteristics and orientations of migratory flows and displacements are partly explained by the whole relations between societies. For instance, this wide examination helps to understand why companies that carry out their activities in previously colonized countries come from colonizing countries (de Sousa Santos, 2019), which many times commercialize and exhaust natural resources.

Most of these theories question Western emancipatory projects claiming that “humanity” has been a concept whose content was initially held or represented by the colonizers, while the colonized peoples were classified as uncivilized races (Lugones, 2010: 744). In clear connection with the Butler’s “constitutive outside”, decolonial studies assert that since the late fifteenth century an idea of humanity is built excluding the colonized communities imposing also a system of global colonial domination and/or capitalist and modern power (Quijano, 1995). The “abysmal line”, in terms of de Sousa Santos (2010), or the “colonial power matrix”, according to Mignolo (2000), are fixed by excluding people from the emancipatory of the liberal project and this has been also the reason to question the universality of human rights (Arias Marín, 2013). This same line defined the capacity and the situations of power to consolidate a privileged position (or hegemony) of the epistemologies emerged in the global North in front of the indigenous epistemologies, like happened regarding the orality compared to the writing (Madlingozi, 2019: 254). In short, this process has configured the political, legal and economic organization, and also the inter-subjective relations and the production of knowledge, which reminds us of Foucault’s theses. Hence some authors prefer to speak of coloniality and to distinguish it from colonialism, circumscribed to the first dimensions (Maldonado-Torres, 2007: 243; Soria, 2015: 70).

In this sense, the decolonial theories explain how the categories and identities have been constructed from the coloniality of knowledge, devaluing and suppressing the production of meanings, symbolic universes and even the different subjectivities (Quijano, 2000: 540-541). So, we refer to this theoretical framework because it not only introduces categories relative to the subjects and the identities, but it serves to explain how it introduces another dualism that has determined and configured the western reality and, therefore, almost universal: the binomial woman/man. This is, the consolidation of gender as a feature, a category or an axis on which meanings, spaces, times and values are attributed to each one of them.

This colonial line or of coloniality constituted therefore a line of dehumanization of the "discovered" places at the same time that it became also a line of color, when racializing the subjects (Maldonado-Torres, 2019: 94; Quijano, 2000: 535). Fanon explains this through his phenomenology of the body and how black bodies were not (ontologically speaking), because the notion and category of the body was that of white bodies. That is, "for black men, consciousness of the body is a third-person consciousness and the feeling is that of denial" (Fanon, 1986: 110). Again, racialization serves to neutralize and

universalize the characteristics of the one who holds power, even if it refers to the faculty of definition and/or production of knowledge (Butler, 2017: 79-81). What is still lacking from a further accomplishment is the implementation of the intersectional approach of race and gender in decolonial studies.

8. THE (DE)COLONIALITY OF GENDER: ANZALDÚA, LUGONES AND SPIVAK

I have previously pointed out that gender coloniality was consolidated along the process of colonization and coloniality. This means that gender is introduced as a category and as a signifier from the colonizing global north. This theoretical framework is relevant because it becomes the original matrix on which the rest of the structures and axes of identity are built. We can say that "the man-woman binomial is not only one amongst many, but it is the only one that crosses over and makes possible the establishment of the others, by providing them with the very matrix of the difference of the binary logic and the respective hierarchical value code. (...) It is important to remember that neither the transformations in the gender power relations nor the displacements of the colonial line undid the sexed logic in which the production of civilizing abysses is based, including the one that sustains the own definition of the West and all a European liberal norm that expanded globally" (Martins, 2019: 495). I reiterate, since then gender is constitutive and the origin of structures, relations and identities (Mendoza, 2019).

For this reason, the decoloniality process must start deconstructing this binary logic and the code of hierarchical values. *A fortiori*, because the decoloniality of gender also allows a global critique of the heteronormative racialized capitalist oppression generated from its roots, as argued by Anzaldúa (2016), Tamale (2011) and Lugones (2010). From this location, it is possible to identify and resort to the intersectionality of the different and complex systems of oppression, but it is necessary to take into account Spivak's warning, who recalled that subalternity has affected women more intensely, also modifying the meaning of some axes such as raciality (Spivak, 2011: 70). It is not possible then to perpetuate or maintain relationships of inequality towards the positions of subalternity, as happens when the position of subject is denied to women when white men protect dark-skinned women from dark-skinned men (Spivak, 2011: 77).

In this regard, it is appropriate to recall the legal reasonings in cases of sexual violence in Rwanda and the former Yugoslavia¹³. If the arguments of both courts regarding the consideration of these acts as crimes of genocide or crimes against humanity are examined, it is possible to find aspects of these relationships. The judicial proceedings opened then were the first to prosecute these conducts, so their determination was solved by interpreting them with criteria from national systems where this decolonial view has generally been lacking. In this sense, Mackinnon's distinction on how to understand rape - or sexual violence in a broad sense - whether a sexual or a coercive act is an example

¹³ Before the International Criminal Court was even established, the International Criminal Court for the former Yugoslavia and the International Criminal Court for Rwanda issued case law on the so-called "gender crimes", whose principles and interpretations was lately assumed by the international jurisprudence, also by the ICC (MacKinnon, 2006c).

of rethinking meanings and categories. If it is sexual, it requires a finding of absence of consent. Conversely, it is irrelevant if the environment is presumed to be so coercive *per se* as well as to invalidate it. As Mackinnon points out, the initial jurisprudence that assumes this second position presumes a relationship of inequality such that it prevents women from making decisions about their sexuality, despite the fact that this was one of the struggles of the feminist movements shortly before in the United States and Europe. So that, this perception criminalizes any consensual intercourse between a woman and a man from opposing communities, denies sexual autonomy and imposes a position of subordination on women in a given social community (Mackinnon, 2006c: 950-954).

These same considerations may apply to refugees, whose protection can never be motivated by paternalistic and ethnocentric notions of vulnerability far from the human rights approach (Tamale, 2011; Anzaldúa, 2016). It is possible to identify a trend in this direction when temporary protection has been set up for displaced persons who have fled their countries for reasons that did not exactly match to the requirements of asylum, which has not been equated with it, and this rather arises and consolidates a lower content, i.e., the license or authorization of temporary residence on humanitarian grounds.

Although no international obligation is breached by providing this temporary and secondary protection, this has been the protection initially granted to cases where protection was sought for gender-related grounds in our system (Parella, 2003). Asylum claims based on sexual orientation and gender identity have faced similar obstacles. However, there are certain peculiarities in this regard that justify reminding these theoretical frameworks. If we think about the asylum system, these claims share the private or intimate nature of religious beliefs or political ideas, while are also closer to those related to gender, being this in all of them the foundational axis from which societies are built (Anzaldúa, 2016). Likewise, those categories (connected and derived from gender) were created in the West and imposed by ignoring the pre-existing sex-affective and gender diversity in colonized communities, which has caused their rejection today by being identified with the imposed culture (Tamale, 2011).

Finally, due to the characteristics of the asylum procedure and the requirement of a self-referenced narrative, agents often examine claims with Western criteria or standards that are different from those experienced by refugees. For example, being homosexual has been identified with an specific behavior or expressions (that can hardly be) universal, such as requiring knowledge of the way homosexuals live in big cities or their leisure, which reveals standards related to social class, gender and national origin (Millbank, 2009). Probably, the essential challenge continues to be to articulate legal measures or tools that allow us to start from the social relations and structures that shape and have shaped us, and instruments that make it possible to identify the contexts, positions and axes that cross. In any case, these theoretical frameworks give already the mains clues to think about it and being aware of these complex identities.

9. CAN WE BUILD A SELF-NARRATIVE?

So far, the decolonial theories may be useful to initiate a process of rewriting or rethinking the communities and subjects before excluded, as well as those categories on which the legal discourse is constructed. A process of decentralization and recontextualization of the subject begins from the Mignolo's so-called "praxis of decoloniality" (Mignolo, 2011: 90). In order to carry out this decentralization, which implies fighting the exclusion and absence of the colonized subjects, new perspectives, senses and meanings coming from these communities are integrated. In other words, subjects are contextualized, allowing the process of resignification to take place from excluded spaces and epistemologies, thus altering the relations of domination built on gender, race and sexuality, amongst others. This is the project that law should recover: to be oriented towards social change without creating subalternities.

It is therefore necessary to discern whether other frameworks or conceptions are possible to justify a political and legal project of recognition of rights beyond the individual or that assumes the complex character of contextualized subjects, abolishing the complex relations of domination. Butler (2004; 2017) suggests this with her notion of vulnerability as an ontological marker; all human beings are vulnerable and this vulnerability makes us unique as a species. Politically and normatively, this approach seeks the radicalization of democracy based on the recognition and re-evaluation of our shared and generalized condition in terms of equality, making possible "an overcoming of the emancipatory universal figures that are sustained on identity categories" (Martínez Prado, 2015: 333).

We believe that this may be one of the reasons why the mechanisms of emancipation that are sought must start from the intersectional approach and bring together the struggles that we have referred to, being aware of the history or contextualization of the categories in which we find our possibilities of action (Álvarez, 2017a). Identity - also sexual or gender identity - is the result of a process in constant construction, which can hardly be required and proved in legal proceedings. Firstly, because there is no authenticity in these terms, nor the possibility of proving it, nor is it a sufficient or unique criterion to conform it. Secondly, because it is a subjective experience that depends on the social contexts in which we build ourselves and that can be resignified according to the displacements, the deterritorialities we face, and the personal development projects we initiate or go through. It is important, then, to ensure an effective protection of the shared vulnerability and to confront the oppressions of the subaltern subjects, as part of this ecology of the post-abysal dignities (de Sousa Santos, 2019: 37).

With this scenario, it should be possible to rethink law and rights as mechanisms of protection, as well as to strengthen the instruments from which to increase the agency and autonomy of subjects vis-à-vis those in power. Here is where human rights should be invoked. If one of the criticisms raised by the decolonial framework aims to avoid the quasi-natural or automatic identification of certain practices with an identity or culture (Tamale, 2011), as far as the asylum system is concerned, the assessment of the accounts must be limited to the situation of lack of protection due to the inability or

reluctance of national authorities to do so. The fact that the subject's lack of protection is proved implies that this individual is outside the socio-normative context and the legal community.

Until now, sexual and gender diversity have been considered as other motives for persecution related to the membership on a particular social group clause, without taking into account the characteristics of each one. It should be noted that this is not usually a visible trait (as race or sex are), nor are they traits or characteristics externally recognizable, such as affiliation to political movements, ideologies or religious beliefs. It is therefore an initially individual characteristic or feature that must be revealed, what is difficult to fit into current evidentiary systems. For this reason, it is appropriate to contrast the current regime with a procedure in which the reason for persecution is not as relevant as the acts of persecution and lack of protection. Likewise, in order to prevent the recurrence of exclusions from certain experiences, it is appropriate to recall human rights as standards or paradigm. Such a change in the perception of rights violations may justify other movements being granted asylum protection on a permanent basis. For example, the case of climate migration.

Without aiming to be exhaustive, some reasons have been given to question a procedure and a regime designed in categories constructed from a complex context full of unequal relations and subjects in very different positions. With these coordinates, convenient for other similar cases, it is possible to guide the right to action, and the action cannot be other than to promote an effective protection of rights. And this protection cannot be reduced or have only a remedial character, but it should also be oriented towards the elimination of power relations in order to recover a genuine emancipatory sense.

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